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March 25, 2002

VIA ELECTRONIC MAIL

William F. Caton, Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: City Signal Communications, Inc.
Written *Ex Parte* - CS Docket No. 00-253

Dear Mr. Caton:

Pursuant to Section 1.1206(b) of the Commission's Rules, American Fiber Systems, Inc. ("AFS" or "Company") is submitting this written *ex parte* in further support of City Signal Communications, Inc.'s Section 253(d) preemption petition in the above-referenced docket. AFS previously filed a comment in this docket and the dockets of the companion matters on January 30, 2001, and is making this *ex parte* submission to supplement its prior comment. In particular, AFS has experienced problems, similar to those that City Signal endured in Cleveland Heights, Ohio, in another area suburb, Shaker Heights, Ohio. The delays and impediments to placing telecommunications facilities in the rights-of-way imposed by those Ohio cities prohibit or have the effect of prohibiting the provision of telecommunications services by new market entrants in violation of section 253 of the Telecommunications Act of 1996.

AFS provides competitive infrastructure by building metropolitan fiber rings in second and third tier cities and offers customers dark or lit fiber strands to transmit telecommunications and data services. As a new company to this industry, obtaining unimpeded access to public rights-of-way to install its facilities is a major factor in AFS's ability to meet business plan objectives, and to attract equity and debt financing for continued operations and growth.

AFS cannot commit the large amounts of capital required to build a fiber network based on speculation. The Company first determines market demand in the area and gets customer commitments to cover 25% or more of the cost to build. These commitments require a signed contract with a defined delivery date based on preliminary route designs. The next step is to engineer the route for least cost to the Company and least disruption to the cities along the route. With these initial construction drawings, the cities and counties are approached to obtain the franchises, licenses or permits required to construct in the public rights-of way. The Company offers to meet with local government officials to explain how the Company's business plan will bring broadband capability to their area - a fact they can then market to attract new businesses and retain existing businesses in their tax base. It seems like a win-win

situation. The Company gets to make a profit by building a network for multiple users who cannot afford, or do not desire, to maintain a network on their own, and the city gets enhanced infrastructure to support its future economic growth.

At this point in the process, however, a strange thing happens in some cities. Instead of being treated in a favorable light because it is offering to bring improved infrastructure to a city, the Company is viewed as if it is public enemy number one whose sole purpose is to disrupt the city without bringing any immediate benefit to the local constituents. If the Company wants to avoid inordinate delays and obtain the construction permits required to meet the delivery schedules of its customer contracts, it must agree to just about any terms a city proposes. Those terms have included annual fees that exceed the cost of maintaining the right-of-way, excess regulation of services and overreaching reporting requirements, as well as entry barriers similar to those imposed by the City of Cleveland Heights -- a requirement to underground facilities when other utilities and telecommunications carriers (including the incumbent phone company) are permitted to maintain their facilities aerially, a requirement to install or pay for the installation of excess capacity to accommodate other providers who may or may not subsequently enter the market, and a requirement to donate network facilities for city use.

AFS has endured these same types of impediments to rights-of-way entry that City Signal has faced in Cleveland Heights, Ohio, in attempting to place its facilities in the public rights-of-way in the suburb of Shaker Heights, Ohio. A copy of the agreement that AFS must sign to gain access to the public right-of-way in Shaker Heights, underlined to showcase the following points, is attached for the Commission's consideration.

- AFS first met with the City on August 2, 2001, to seek access to the public rights-of-way. The City refused to issue construction permits until AFS signed an agreement. The agreement is just now in the final draft stage, six-and-a-half months later. The AFS construction crew calls the City daily about the permits that are needed before construction can begin. Due to the City's delay, AFS's customer commitment date is now in serious jeopardy.
- Even though existing utilities' facilities are placed aerially on poles, the City is requiring that AFS build its facilities underground. (See p. 2, para. 1.2 of Agreement). Thus, AFS was required to re-engineer its route at a cost of about \$1.00 per foot, and the cost to construct the Shaker Heights section of the ring will increase threefold. (See Affidavit of David M. Baxter, attached to comment of American Fiber Systems, Inc., filed January 30, 2001.)
- The City is requiring AFS to install conduit three times the capacity needed by AFS, which will add substantially to its costs. (See p. 4, para. 2.2 of Agreement).
- The Agreement requires that AFS build conduit for the City at no cost to the City. (See p. 8, para. 2.15 of the Agreement).

New competitive providers are drastically impacted by the impediments and delays, such as those described in this submission, that cities impose on providers who request to access their public rights-of-way. The provider is either forced to change its business plan and avoid the city entirely, or it eventually must capitulate to the city's unfair and unreasonable, as well as discriminatory and non-

competitively neutral requirements in order to gain market entry.¹ Thus, the company enters a market at a competitive disadvantage to the incumbent carrier and other providers already operating in the market. Long term, this situation creates increased risk and decreased profit potential, which affects the company's ability to raise additional equity and debt.

The requirements that Cleveland Heights seeks to impose on City Signal -- placement of facilities underground and payment for the installation of excess conduit for which the company may never be reimbursed -- are examples of serious rights-of-way impediments faced by new entrants. They undermine the ability of competitive telecommunications providers to successfully implement their business plan. Further, these requirements, which are not legitimate rights-of-way management directives, violate section 253 of the Act. Accordingly, AFS requests that the Commission grant City Signal's petition and preempt the unlawful requirements that Cleveland Heights seeks to impose as a condition to accessing the public rights-of-way.

Please feel free to contact me if you have any questions or need additional information regarding this submission.

Respectfully submitted,

/s/ Amy M Gilchrist

Amy M Gilchrist
Vice President, Regulatory Affairs

Enclosure

cc: John Gibbon, Esq. Walter & Haverfield
Lisa Lutz, Esq., City Signal

¹ AFS does not object to a city's management of its public rights-of-way. What AFS strongly objects to are the discriminatory and non-competitively neutral requirements and costs that were not borne by the incumbents that cities impose before new facilities based competitors can even build a network. In this case, for example, new entrants should be permitted to place all of their facilities above ground on poles like the incumbents, or all carriers, including the incumbents, should be required to place their facilities underground.